117 (2)

No. 08-754

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

RICHARD SINGLETON, RUTH SINGLETON and AMY SINGLETON,

Petitioners,

v.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN AG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CIVIL PROCEDURE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* Brief in Support of the Petition for Writ of Certiorari is filed jointly by the previously listed law professors, all of whom teach and write in the area of civil procedure. Because of our scholarly work in the area, *amici* have a strong interest in the law's development. *Amici* file this brief in their individual capacities. Law school information is presented for identification purposes only, and indicates an endorsement of the views expressed in this brief only by the individuals listed.

SUMMARY OF ARGUMENT

Confusion exists among the lower courts as to whether and under what circumstances a writ of mandamus may issue to correct a trial court's abuse of discretion in granting or denying a transfer of venue under 28 U.S.C. § 1404(a). Specifically, confusion exists over whether and to what extent the

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part and no person other than *amici* made a monetary contribution to the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief.

appellate court may independently assess and reweigh the convenience of the parties and witnesses and the interests of justice. Some courts refuse to engage in any reweighing and accord substantial deference to the balance of conveniences that the district court struck. Other courts such as the Fifth Circuit in this case have conducted detailed reviews of the circumstances supporting the convenience of the parties and witnesses and the interests of justice and accorded little deference to the district court's balance of these factors.

This confusion among the circuits has the potential to impact a sizeable and stable number of cases pending before the lower courts. One group of commentators has estimated that transfer motions are granted in between 1.2% to 1.5% of the non-prisoner civil cases terminated in federal court. Those same commentators estimate that as many as 10,000 transfer motions may be filed in federal court each year. The potential cost and delay occasioned by the type of broad mandamus review sanctioned below has the potential to significantly impact each of these cases in which a transfer motion is filed. It also provides an incentive for parties to file transfer motions in more cases.

Amici urge this Court to grant the Petition for a Writ of Certiorari to resolve the confusion among the lower courts as to the appropriate standard of review on mandamus and to narrowly circumscribe the power of the circuit courts to review discretionary transfer decisions through mandamus. Such narrow

limits on mandamus review will better comport with congressional intent embodied in 28 U.S.C. § 1292 and help reduce costs and delays associated with litigation over forum choice.

ARGUMENT

I. This Court Should Grant the Petition for Writ of Certiorari Because Confusion Exists Among the Lower Courts as to When a Circuit Court May Issue a Writ of Mandamus to Review a Discretionary Decision to Grant or Deny a Transfer

Section 1404(a) of the Judicial Code grants a district court discretion to transfer a case before it to another district where it might have been brought if transfer will be "for the convenience of the parties and witnesses and in the interests of justice." 28 U.S.C. § 1404(a). In the instant case, shortly after Plaintiffs filed their initial complaint, Defendants moved to transfer the action from United States District Court for the Eastern District of Texas to the United States District Court for the Northern District of Texas. (*See* Cert. Pet. App. E.) The district court denied the motion to transfer, concluding in a detailed opinion that the interests of justice and the convenience of the parties and witnesses did not warrant transfer. (*See* Cert. Pet. App. D & E.) Sitting *en banc*, the Fifth Circuit issued a writ of mandamus to correct what it characterized as a "clear abuse of discretion," (Cert. Pet. App. A at 30a), and a "patently

erroneous" result, (Cert. Pet. App. A at 28a, 30a), on the part of the district court in refusing to transfer the case. In reaching its decision, the Fifth Circuit undertook a detailed review of the circumstances supporting the convenience and justice factors articulated in Section 1404(a) and disagreed with the district court's conclusion as to each of these factors. (*See* Cert. Pet. App. A at 13a) ("We 'review[ ] carefully the circumstances presented to and the decision making process' of the district court." *In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir. 2003)); (*see* Cert. Pet. App. A, at 22a-28a).

As the Petitioner for a Writ of Certiorari documents, confusion exists among the lower courts over whether and under what circumstances mandamus will lie in a case such as this to review the district court's exercise of its discretion to deny or grant a Section 1404(a) transfer. Conflict exists not only amongst the circuit courts but within the circuits as well. Indeed, a leading treatise has observed that "there is no agreement on the use of the writs to review the trial court's exercise of its discretion," 15 Charles Alan Wright, Arthur Miller & Edward Cooper, FEDERAL PRACTICE AND PROCEDURE § 3855 at 384 (3d ed. 2007), and characterized the decisions of the courts of appeals as "in hopeless conflict." *Id.* (quoting *Hustler Magazine v. U.S. District Court*, 790 F.2d 69, 70 (10th Cir. 1986)); *see also Roofing & Sheet Metal Servs. v. La Quinta Motor Inns*, 689 F.2d 982, 987 (11th Cir. 1982) ("There is substantial disagreement among the circuits, and some apparent confusion

within the respective circuits, concerning the appropriate role of mandamus as a remedy for abuses of discretion by district courts in deciding motions under § 1404(a)."); Carolyn Kelly MacWilliam, *Mandamus, Prohibition, or Interlocutory Appeal as Proper Remedy to Seek Review of District Court's Disposition of Motion for Change of Venue Under § 1404(a) of Judicial Code*, Annotation, 28 A.L.R. FED. 2D 311, 331 (2008) (noting that some courts have permitted mandamus review where "there was a clear-cut case of an abuse of judicial discretion below" while other courts have prohibited review "even if the trial judge abused his or her discretion"); David E. Steinberg, *The Motion to Transfer and the Interest of Justice*, 66 NOTRE DAME L. REV. 443, 476 (1990).

A few decisions appear to conclude that where a district court has authority to transfer a case and where the district court has considered the appropriate factors in weighing whether to transfer a case, mandamus will not lie to correct an abuse of discretion in weighing those factors. For example, in *All States Freight v. Modarelli*, 196 F.2d 1010, 1012 (3d Cir. 1952), the Third Circuit denied a petition for a writ of mandamus in a case in which the district court had refused a motion to transfer from a court that lacked jurisdiction over potential third-party defendants to a district court which had jurisdiction over those third-party defendants. In denying the writ, the court noted that it would not grant mandamus review where the district court had considered

the interests stipulated in the statute in reaching its decision to grant or deny a transfer. *Id.*

Likewise, in *In re Josephson*, 218 F.2d 174, 182-83 (1st Cir. 1954), the First Circuit dismissed a petition for a writ of mandamus, seeking review, in part, on the ground that the district court abused its discretion in balancing the conveniences of the parties to grant the transfer. In so doing, the court noted:

> As to the second of these contentions, that the order of transfer was an "abuse of discretion" under the circumstances, we are clear that as a matter of general policy we ought not to go into that in the present proceeding. . . . No doubt upon occasion a district court within this circuit may make an error of judgment in transferring a case to a district outside the circuit. So, too, a district court outside our circuit may on occasion make a similar error of judgment in transferring a case to a district court within this circuit. We do not anticipate that, on balance, our potential appellate jurisdiction will suffer any significant impairment. On the other hand, § 1404(a) provided an administrative facility that was supposed to contribute to the convenience and expedition in the disposition of the cases. This policy would certainly be defeated if the courts of appeals in the transferor district should make it a routine practice to hold up trials of a case pending review on mandamus of the question of where the case ought to be tried. . . . Accordingly, we serve notice that in the future,

> except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus.

Id. Though not expressly considering requests for mandamus review of exercises of discretion, subsequent cases have reiterated this prohibition. *See, e.g.*, *In re Federal-Mogul Global*, 300 F.3d 368, 378-79 (3d Cir. 2002) ("Generally, a writ will only issue if the district court did not have the power to enter the order and then 'only if the party seeking the writ meets its burden to demonstrate that its right to the writ is clear and indisputable.'"); *accord Carteret Savings Bank v. Shushan*, 919 F.2d 225, 232 (3d Cir. 1990) ("We are well aware, of course, that the mere fact that the district court has made an error is not in itself the basis for the issuance of a writ of mandamus. In general, we may issue the writ only if a district court did not have the authority to make an order.").

Other courts allow mandamus review for abuse of discretion. However, even amongst these courts, confusion exists as to the circumstances under which mandamus will lie. For example, in *Toro Comp. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), the Eighth Circuit recognized limited mandamus review of a district court's exercise of its discretion. The court noted that a writ would issue only to remedy "manifest judicial arbitrariness." *Id.* However, it refused to

engage in any independent weighing of the convenience and justice factors. The court explained that "[u]nless it is made clearly to appear that the facts and circumstances are without any basis for a judgment of discretion, the appellate court will not proceed further to examine the district court's action in the situation. If the facts and circumstances are rationally capable of providing reasons for what the district court has done, its judgment will not be reviewed." *Id.* Thus, the court upheld the district court's transfer order with little discussion, noting only that the issues raised in the transferred claims were "obviously" embraced in a related case pending in the transferee district. *See also Kasey v. Molybdenum Corp. of America*, 408 F.2d 16, 20 (9th Cir. 1969) ("We decline to issue the writ when it appears from a well-reasoned holding by the trial judge that he has considered the issues listed in 1404(a) and has made his decision accordingly. It is not our function to substitute our judgment for that of the judge most familiar with the problem.").

In *In re National Presto Indus.*, 347 F.3d 662 (7th Cir. 2003), the Seventh Circuit also recognized the availability of mandamus review to correct an abuse of discretion under exceptional circumstances only. However, the court was willing to engage in more detailed review of the convenience and justice factors. The court held that mandamus should be granted only if the district court "so far exceeded the proper bounds of judicial discretion as to be legitimately considered usurpative in character or in violation of

a clear and indisputable legal right, or at the very least, patently erroneous." *Id.* at 663 (quoting *In re Rhone-Poulenc*, 51 F.3d 1293, 1295 (7th Cir. 1995) and *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992)). In *National Presto*, the SEC instituted civil enforcement proceedings in the Northern District of Illinois where the SEC's Midwest Regional Offices are located. *Id.* at 663, 664. The district court refused to transfer the action to the Western District of Wisconsin where the defendant's corporate headquarters were located, and the defendant sought a writ of mandamus from the Seventh Circuit. *Id.* at 663, 664. According great deference to the district court's balance, the Seventh Circuit denied mandamus despite recognizing that nearly all of the convenience and justice factors favored litigation in the Western District of Wisconsin. The court noted that all of the defendant's potential witnesses, some of whom would be reluctant to testify, were within the subpoena power of the Western District of Wisconsin but outside of the subpoena power of the Northern District of Illinois; that all of the original documents in the case were located within the Western District of Wisconsin; that the Western District of Wisconsin had a lighter docket than the Northern District of Illinois; and that the only people who would be inconvenienced by litigation in the Western District of Wisconsin were the members of the SEC's Midwest Regional Office staff. *Id.* at 664. Nonetheless, the court concluded that even though the balance of convenience favored litigation in the Western District of Wisconsin, "the balance is not so far askew as to justify the

extraordinary relief sought by Presto." *Id.* at 964. Thus, the Seventh Circuit was willing to engage in some independent review of the convenience and justice factors, but it accorded great deference to the balance struck by the district court.

In contrast, in *In re Ralston Purina Comp.*, 726 F.2d 1002 (4th Cir. 1984), the Fourth Circuit purported to recognize only limited mandamus review of discretionary decisions to grant or deny a transfer. However, like the Fifth Circuit in the instant case and other cases, *see In re Horseshoe Entm't*, 337 F.3d 429 (5th Cir. 2003) (issuing writ of mandamus to the Middle District of Louisiana), the court engaged in its own weighing of the convenience and justice factors. The court stated that a clear and indisputable right to a writ of mandamus required "considerably more strained circumstances than does a mere abuse of discretion" and that such a clear and indisputable right existed only if the district court's abuse of discretion "amount[ed] to a judicial usurpation of power." *Id.* at 1005 (quoting *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35 (1980)). Ultimately, the court refused to issue the writ of mandamus directing the district court to sever and transfer the cases before it. However, in so doing, it reviewed and rejected the district court's conclusion that the convenience of the parties would be best served by trial in the original forum. *Id.* at 1005. It also noted that the district court gave little consideration to the convenience of the witnesses. *Id.* at 1005-06. It then conducted its own review of the convenience of the witnesses and upheld the district court's decision based on its independent

conclusion that the convenience of the plaintiffs' witnesses would be better served by trial in the original forum. *Id.* at 1006.

Likewise, subsequent to this case, a panel of the Federal Circuit has interpreted the Fifth Circuit's approach in this case to allow for broad mandamus review. In *In re TS Tech USA Corp.*, 2008 WL 5397522 (Fed. Cir. Dec. 29, 2008), a panel of the Federal Circuit, applying Fifth Circuit law, issued a writ of mandamus to the Eastern District of Texas to correct what the panel concluded was a clear abuse of discretion in refusing to transfer the case before it to the Southern District of Ohio.

On the far side of the spectrum, at least one court has purported to review for "clear abuse of discretion," although it ultimately issued a writ ordering return of the case because it concluded that the district court failed to consider the relevant convenience and justice factors rather than because it disagreed with the balance struck by the district court. *In re Warrick*, 70 F.3d 736 (2d Cir. 1995). In *Warrick*, the district court transferred the case before it in the interest of judicial efficiency to a district where "a previous case presenting the same complex facts and issues had been decided and dismissed." *Id.* at 737. The Second Circuit rejected the district court's finding of judicial efficiency, noting that because the related case had been resolved, transfer did not allow for consolidation or allow the defendants to defend against the related claims in a single setting. *Id.* at 740. However, the court also found that the district court abused its discretion because it failed to even

consider the convenience of the parties as required by Section 1404(a). *Id.* Thus, the court granted relief not where it disagreed with the district court's balance but only where the district court failed to balance all relevant factors.

II. The Court Should Grant the Petition Because Avoiding the Cost and Delay Caused by Mandamus Review of Discretionary Transfer Decisions Is a Matter of Importance Beyond This Case

A. Transfer Motions Are Filed in a Sizeable Number of Civil Cases

By defining the availability and scope of review of transfer motions, a decision in this case has the potential to impact any case in which a transfer motion is filed. While no data exist pinpointing the exact number of transfer motions filed each year or the percentage of cases in which transfer motions are filed, available research suggests that transfer motions are filed in a small but sizeable and stable number of civil cases. In the most extensive study of Section 1404 transfer motions available, Professors Eisenberg and Clermont analyzed information compiled by themselves and previous researchers from databases maintained by the Administrative Office of U.S. Courts to conclude that the number of transfer motions was stable if not increasing slightly. Kevin C. Clermont & Theodore Eisenberg, *Exorcising The Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1526 (1995). Professors Eisenberg and Clermont started by

looking at the number of cases terminated in a given year that arrived in the district court by transfer from another district. *Id.* They concluded that the number of transfer motions granted each year in non-prisoner cases grew in number from 1,216 in 1979 to 2,543 in 1991 and also as a percentage of non-prisoner cases from 1.2% in 1979 to 1.5% in 1991. *Id.* Based on these data and their estimated success rate for transfer motions, Professors Eisenberg and Clermont estimated that as many as 10,000 transfer petitions may be filed each year.[2] *Id.* at 1529.

A review of the Federal Court Cases: Integrated Data Base for 2007 reveals that 2,171 non-prisoner cases, or about 1.16% of the non-prisoner cases terminated in 2007, arrived in their court of termination by virtue of transfer from another district pursuant to Section 1404. INTER-UNIVERSITY CONSORTIUM FOR POL. & SOC. RES., FEDERAL COURT CASES: INTEGRATED DATA BASE, 2007, ICPSR Study No. 22300 (2008). Employing Professor Eisenberg and Clermont's suggested success ratio yields an estimate of 11,571 transfer motions filed each year. Thus, transfer motions appear to constitute a sizeable portion of the federal district court docket. The issues raised in the Petition

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[2] Professors Clermont and Eisenberg conducted a survey of reported decisions to generate a rough estimate of the ratio of unsuccessful to successful transfer motions. They then extrapolated a ratio of two to one of unsuccessful motions to successful motions from this search. *See* Clermont & Eisenberg, *Exorcising Forum Shopping*, at 1529.

for Writ of Certiorari may potentially arise in these cases. A decision in this case has the potential to impact all of these transfer cases by limiting or increasing the opportunities for the losing parties in the transfer litigation to seek appellate review of the district court decision granting or denying a transfer.

B. The Cost and Delay Associated with Mandamus Review Has a Great Impact on Each Case

Even if the number of cases affected by a decision in this case is small, the impact on any given case is significant. The decision below and other similar decisions provide an incentive for the losing parties in these transfer cases to seek mandamus review before the appellate court as a routine matter and also may encourage additional parties to file transfer motions. Routine mandamus review of discretionary transfer decisions will increase significantly the litigation costs and delay resolution in cases involving transfer motions.

As Judge King noted in her dissenting opinion, the Fifth Circuit's decision here illustrates the perils of protracted litigation surrounding procedural issues. (Cert. Pet. App. A at 42a.) Plaintiffs filed their initial complaint on May 30, 2006. (Cert. Pet. App. E at 83a.) Volkswagen filed its motion to transfer three weeks later on June 21, 2006; and the trial court issued its original order denying Volkswagen's motion to transfer on September 12, 2006. (*Id.* at 82a). Ultimately,

the trial court denied Volkswagen's motion for reconsideration on December 7, 2006 – less than six months after Plaintiffs filed their complaint. (Cert. Pet. App. D at 77a.) Mandamus proceedings, however, did not conclude before the Fifth Circuit until October 10, 2008. (*See* Cert. Pet. App. A at 1a.) Thus the parties have spent more than two years litigating the appropriate venue for this action, and a substantial portion of this delay was the result of mandamus proceedings rather than the initial transfer proceedings before the district court.

Moreover, it appears that the case would have concluded on the merits before the Fifth Circuit disposed of the mandamus petition. Discovery was scheduled to close on September 19, 2007, (Cert. Pet. App. A at 42a), and jury selection was slated to begin on October 23, 2007 – almost a full year before the Fifth Circuit issued its *en banc* opinion granting the writ of mandamus. (*See id.*) Thus, the two years the parties have spent litigating the issue of where the case will proceed is apparently more time than they would have spent litigating the merits of the case. Preparation and arguments of motions to transfer before the district court and the Fifth Circuit have increased the cost of the litigation as well. All of this litigation has taken place in a case where neither party contests the authority of the original court to hear the case, but rather the parties merely dispute the issue of whether another court 155 miles away would be more convenient. Given the close proximity of the two courts one might suspect that the cost of

this transfer litigation exceeds the incremental cost to witnesses alleged to be inconvenienced by the Plaintiffs' original choice of forum. Such a result seems at odds with Section 1404(a) – a provision seemingly intended to reduce litigation costs to parties, witnesses, and the court.

Indeed, the Fifth Circuit's decision here and the decisions of other circuits allowing broad mandamus review of discretionary transfer decisions not only seem to run counter to the purposes of Section 1404(a) but also seem to contravene the congressional prohibition on piecemeal litigation embodied in the federal Judicial Code in provisions such as Sections 1291 and 1292 limiting the scope of interlocutory review and Section 1447 limiting review of remand orders. This Court has long recognized this congressional policy against piecemeal litigation by narrowly construing doctrines and statutes allowing for interlocutory review, including narrowly construing the scope of mandamus relief.

For example, in *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33 (1980), this Court reversed a circuit court order issuing a writ of mandamus to reinstate a jury verdict after the trial court granted a motion for a new trial. The Court noted that:

> A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. . . . The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is

> committed to discretion, it cannot be said that a litigant's right to a particular result is "clear and indisputable." *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666, 98 S.Ct. 2552, 2559, 57 L.Ed.2d 504 (1978) (plurality opinion).
>
> To overturn an order granting a new trial by way of mandamus indisputably undermines the policy against piecemeal appellate review. Under the rationale employed by the Court of Appeals, any discretionary order, regardless of its interlocutory nature, may be subject to immediate judicial review. Such a rationale obviously encroaches on the conflicting policy against piecemeal review, and would leave that policy at the mercy of any court of appeals which chose to disregard it.

Id. at 35.

Likewise, in *Digital Equipment Corp. v. Desktop Direct*, 511 U.S. 863 (1992), this Court recognized that narrowly construing the collateral order doctrine would render some pretrial errors virtually unreviewable. The Court, nonetheless, refused to expand the scope of the doctrine. The Court noted:

> This must be so because the strong bias of § 1291 against piecemeal appeals almost never operates without some cost. A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the

> sense that relief from error can never extend to rewriting history. . . . But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third Cohen requirement.

Id. at 872.

This Court and the lower courts have acknowledged the wisdom of the final judgment rule in light of the increased costs interlocutory review places on parties and the judicial system. This is particularly true when interlocutory review involves review of issues surrounding the appropriateness of the forum. *See, e.g. Kirchner v. Putnam Funds Trust*, 547 U.S. 633, 640 (2006) ("The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed,' *United States v. Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 90 L.Ed. 982 (1946), and nearly three years of jurisdictional advocacy in the cases before us confirm the congressional wisdom."). Indeed, the lower courts that have refused to extend mandamus review to correct alleged abuses of discretion in transfer decisions have declined to do so because of these costs. For example, in *All States Freight*, 196 F.2d at 1011, the Third Circuit noted:

> Now the effort is being made both in this court and elsewhere to substitute for appeal

> a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point. We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried. Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

C. The Costs and Delay Associated With Mandamus Review Are Unlikely to Produce Corresponding Increases in Accuracy

Furthermore, the costs and delay associated with mandamus review of transfer decisions come without any concomitant increases in accuracy. As Judge King recognized and as this case illustrates, transfer decisions most often take place early in litigation. (Cert. Pet. App. A at 36a.) As stated above, Volkswagen filed its initial motion to transfer the case only three weeks after the Plaintiffs filed their initial complaint. In ruling on the motion to transfer, the

district court judge necessarily needed to consider what evidence and witnesses were likely to be presented in the trial of this case in order to assess the relative convenience of the competing fora to those witnesses and the parties. Making assessments of the likely direction of litigation at this early stage in the proceeding is a speculative inquiry at best. The district court judge can be guided by her experience in past litigation to make these types of assessments. As Judge King noted:

> At this early stage, assessing what best serves the "convenience of the parties and witnesses" and "interests of justice" is hardly an exact science, since it is often unclear how the lawsuit will develop or what issues will be key. But the district court can draw on its experience with the day-to-day reality of litigation issues – an arena in which appellate courts lack expertise.

(*Id.*); *see also Ford Motor Co. v. Ryan*, 182 F.2d 329, 331-32 (2d Cir. 1950) ("Weighing and balancing are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing machinery is available. Of course it is not. At best, the judge must guess, and we should accept his guess unless it is too wild.").

Moreover, because of the fact-intensive nature of Section 1404(a) decisions, appellate review by mandamus is not likely to provide clear guidance to district courts or effective constraints on the exercise of discretion. Thus, review of a few decisions by

mandamus is unlikely to obviate the need for further review in subsequent cases and unlikely to bring greater uniformity to what the Fifth Circuit and commentators perceived to be inconsistencies in the district courts' application of Section 1404(a). (Cert. Pet. App. A at 30a); *see, e.g.*, David E. Steinberg, *Simplifying the Choice of Forum: A Response to Professor Clermont and Professor Eisenberg*, 75 WASH. U. L.Q. 1479, 1503 (1997); Edmund W. Kitch, *Section 1404(a) of the Judicial Code: In the Interest of Justice or Injustice*, 40 IND. L.J. 99 (1965).

CONCLUSION

For the foregoing reasons, we urge this Court to grant the Petition for a Writ of Certiorari.

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